

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 31, 2003

**ALVIN FREEMAN v. TENNESSEE DEPARTMENT OF
PROBATION AND PAROLE**

**Appeal from the Chancery Court for Davidson County
No. 01:3494-I Irvin H. Kilcrease, Jr., Chancellor**

No. M2002-00958-COA-R3-CV - Filed April 7, 2003

This appeal involves a dispute between a prisoner and the Tennessee Board of Probation and Parole. After the Board declined to parole him, the prisoner filed a pro se petition for common-law writ of certiorari in the Chancery Court for Davidson County seeking judicial review of the Board's action. The trial court, acting pursuant to Tenn. Code Ann. § 41-21-807 (Supp. 2002), ordered the prisoner to make a partial payment of the filing fee within thirty days and dismissed the petition for failure to prosecute when the prisoner failed to do so. The prisoner has appealed. We have determined that the trial court properly dismissed the prisoner's petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Alvin Freeman, Whiteville, Tennessee, Pro Se.

Paul G. Summers, Attorney General and Reporter, and Shay B. Winebarger, Assistant Attorney General, for the appellee, Tennessee Board of Probation and Parole.

OPINION

I.

Alvin Freeman was paroled in 1997. He was returned to custody in November 1999 after being arrested and charged with first degree murder. In December 1999, the Tennessee Board of Probation and Parole revoked his parole because he had failed to report his arrest to his parole officer. As a result of the Board's action, Mr. Freeman resumed serving the original sentence from which he had been paroled in 1997.

The Board subsequently met twice to consider whether Mr. Freeman should be re-released on parole. On both occasions, the Board decided to continue the hearing to await a resolution of the pending first degree murder charges against Mr. Freeman. The Board took up Mr. Freeman's parole for a third time in June 2001. Despite the hearing officer's recommendation that the hearing be

continued again, the Board elected to consider the merits of paroling Mr. Freeman and unanimously decided against paroling him because of the seriousness of his original offense and because of the high risk that he would commit other crimes if he was released. The Board also determined that it would not consider Mr. Freeman for parole again until June 2004.

After the Board turned him down for parole, Mr. Freeman obtained copies of documents confirming that the pending first degree murder charges had been dismissed because the physical evidence at the crime scene did not link him to the murder. Believing that this information warranted reconsideration of his request for parole, Mr. Freeman filed an administrative appeal requesting the full Board to consider whether he should be released on parole. The full Board denied the appeal in September 2001, pointing out (1) that his parole had been revoked for “violation of a technical rule rather than [for] his pending charge that was later dismissed” and (2) that there was “no misconduct or procedural error” with regard to the denial of Mr. Freeman’s parole.

On November 9, 2001, Mr. Freeman pro se filed a petition for writ of certiorari in the Chancery Court for Davidson County seeking review of the Board’s denial of his parole. He alleged that the Board had acted in a manner that was “arbitrary, illegal, and fraudulent.” However, he failed to tender the required filing fee with this petition. On November 21, 2001, the trial court ordered Mr. Freeman to make a partial payment of the \$37.50 filing fee within thirty days as required by Tenn. Code Ann. § 41-21-807. On April 4, 2002, after Mr. Freeman failed to pay the filing fee, the trial court dismissed his petition for failure to prosecute.¹ Mr. Freeman filed a timely notice of appeal and on May 13, 2002, authorized the Department of Correction to deduct \$37.50 from his trust fund account to pay the filing fee and to mail the check to the clerk and master.

II.

Persons commencing a civil action in Tennessee’s courts must file a cost bond² and pay an initial filing fee. Persons who are indigent may be excused from filing a cost bond by filing an affidavit stating that they are justly entitled to legal or equitable relief but are unable to bear the expense of the litigation because of their poverty. Tenn. Code Ann. § 20-12-127 (Supp. 2002). Upon the filing of an appropriate affidavit of indigency, the costs are held in abeyance until the end of the litigation.

Indigent persons are not excused from paying the initial filing fees required by Tenn. Code Ann. § 8-21-401(a) (2002). Because of the dramatic increase in the number of pro se civil proceedings being commenced by state prisoners,³ the Tennessee General Assembly enacted Tenn. Code Ann. § 41-21-807 in 1996 to provide an orderly procedure for collecting the required filing fee

¹The State had filed a motion for summary judgment on February 19, 2002. However, in an April 5, 2002 order, the trial court found the State’s motion to be moot on grounds that the case had been dismissed.

²Tenn. Code Ann. § 20-12-120 (Supp. 2002).

³In an earlier case, we noted that the purpose of Tenn. Code Ann. § 41-21-807 was “to address the problems that arise when state courts are confronted by a flood of taxpayer-funded inmate lawsuits.” *Allen v. Lloyd*, No. M1999-01739-COA-R3-CV, 2000 WL 775085, at *3 (Tenn. Ct. App. June 16, 2000) (No Tenn. R. App. P. 11 application filed).

from prisoners who file civil suits in state court. The statute is consistent with the legislature's intention generally that persons instituting court proceedings bear the costs of litigation unless a court in a specific case deems otherwise. *Cf.* Tenn. Code Ann. §§ 20-12-120, 27-9-107 (2000), 29-4-103 (2000), 50-7-304(i)(5) (1999).

Tenn. Code Ann. § 41-21-807(a) requires prisoners to file certified copies of their trust fund account statements for the six months immediately preceding the filing of the complaint. In addition, Tenn. Code Ann. § 41-21-807(b)(1) provides that

If an inmate brings a civil action or files an appeal in forma pauperis, the inmate shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect as a partial payment of any court fees required by law, an initial partial filing fee of twenty percent (20%) of the greater of the average monthly:

(A) Deposits to the inmate's account; or

(B) Balance in the inmate's account for the six-month period immediately preceding the filing of the complaint or notice of appeal.

Mr. Freeman had \$23.55 in his prison trust fund account on the day before he filed his petition in this case. The average balance in his account for the six immediately preceding months was \$24.85. Accordingly, while Mr. Freeman could not have paid the full filing fee when he filed his petition, he had sufficient funds to make the partial payment required by Tenn. Code Ann. § 41-21-807(b)(1). Mr. Freeman's trust fund account records also reflect a deposit and balance history that would have enabled him to make the partial payment required by Tenn. Code Ann. § 41-21-807(b)(1) anytime before the trial court eventually dismissed his petition on April 4, 2002.

Mr. Freeman failed to comply with the trial court's November 21, 2001 order in a timely manner⁴ and failed to present either to the trial court or this court any justification for his failure to do so. He is, therefore, the author of his own misfortune. Appellate courts need not grant relief to persons who failed to take whatever action was reasonably available to them to prevent or nullify the harmful effect of an adverse decision. Tenn. R. App. P. 36(a)

⁴On May 13, 2002, after the trial court lost jurisdiction over the case, Mr. Freeman apparently authorized the Department to deduct \$37.50 from his trust fund account and to send the money to the clerk and master. The record does not reflect that the clerk and master received these funds. In light of the fact that the trial court had already dismissed Mr. Freeman's petition for the non-payment of this fee, we presume that these funds either have been or will be returned to Mr. Freeman.

III.

We affirm the judgment dismissing Mr. Freeman's petition for failure to comply with Tenn. Code Ann. § 41-21-807⁵ and remand the case to the trial court for whatever further proceedings may be required. We tax the costs of this appeal to Alvin Freeman for which execution, if necessary, may issue. We also find that Mr. Freeman's petition and subsequent appeal are frivolous in accordance with Tenn. Code Ann. § 41-21-807(c) (Supp.2002) and Tenn. Code Ann. § 41-21-816(a)(1) (1997).

WILLIAM C. KOCH, JR., JUDGE

⁵Were we to reach the substantive merits of Mr. Freeman's petition, we would find that he has failed to state a claim for the sort of relief available through a common-law writ of certiorari. Mr. Freeman is seeking to challenge the merits of the Board's June 2001 decision to deny him parole. The scope of review under the common law writ of certiorari does not extend to inquiring into the intrinsic correctness of the Board's decision. *Arnold v. Tennessee Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997); *Robinson v. Clement*, 65 S.W.3d 632, 635 (Tenn. Ct. App. 2001).